HOUSE COMMITTEE ON ARMED SERVICES

U.S. House of Representatives

Washington, DC 20515–6035

ONE HUNDRED ELEVENTH CONGRESS

January 20, 2011

President Barack Obama
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing concerning recent press articles indicating that the Administration is currently drafting an executive order to address issues relating to preventive law of war detention. Some of the articles indicate that the executive order may be completed and signed in the coming days. As you know, any issue relating to law of war detention, particularly a legal framework for detention and related review procedures, necessarily must involve congressional authorization. During your speech at the National Archives on May 21, 2009, you cited the need for careful coordination and collaboration with Congress. I therefore request that you ensure not only that Congress is kept fully and currently informed of this effort, but that the Administration commit to working with Congress to develop a path forward.

I fully recognize the importance of crafting a careful and comprehensive framework for the detention of terrorists who wish to harm the United States. I also recognize the challenges and legal complexities related to such an endeavor. This appreciation is why I know this issue is simply too important for the Administration to address on its own. We have to create a system whereby terrorists who pose a legitimate threat to the United States are not released. We also cannot allow U.S. courts to continue to make policy through case law.

In contrast to your laudable comments about your intent to engage with Congress on these issues, there has been no meaningful coordination to date and the Department of Defense has been unable to follow through with House Armed Services Committee requests for a staff briefing. The Committee is fully committed to addressing these critical issues with the Administration. As you said during your speech at the National Archives, "In our constitutional system, prolonged detention should not be the decision of any one man." We must work together moving forward to ensure we are taking all steps necessary to protect our national security.

Thank you for your attention to this matter. I look forward to your timely response.

Sincerely,

Howard P. "Buck" McKeon

HOWARD P. "BUCK" MCKEON
Chairman

HPM:cam

Congress of the United States
House of Representatives
Washington, DC 20515

July 19, 2011

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. President:

We are writing concerning the case of Ahmed Warsame, who was captured off the coast of Somalia and transferred to New York for prosecution in U.S. federal district court. While there are several aspects of this particular case that are of great interest to our committees, we are also extremely concerned about the larger policy questions that this example again brings into focus.

In the "Statement of Administration Policy" regarding the National Defense Authorization Act for Fiscal Year 2012, which passed the House on May 26, 2011, the Administration suggests that Congress is attempting to limit disposition options for the handling of terrorism suspects. Yet, as the Warsame case proves, it is the Administration that has foreclosed options that are absolutely critical during a time of war: namely, non-criminal detention for future captures and prosecution by military commission. By foreclosing these options and failing to create a long-term detention regime that puts a priority on intelligence collection and keeping terrorists out of the United States—combined with reluctance to consult or collaborate with Congress on these issues—the Administration has forced Congress to take action on these issues. These concerns are only heightened given the decision to handle Warsame's case in a manner that directly contradicts pending legislation.

While the primary focus in the media on the Warsame case has been about forum selection for purposes of prosecution, our overarching concern is the lack of a comprehensive detention system to incapacitate and interrogate terrorists captured outside of Afghanistan. Vice Admiral William H. McRaven recently highlighted this problem in testimony before the Senate Armed Services Committee. In response to a question about what would happen if a detainee could not be prosecuted in a U.S. court or transferred to a third country, Admiral McRaven said

that the individual would instead be released. Admiral McRaven also confirmed that the Administration will not consider bringing new detainees to U.S. Naval Station, Guantanamo Bay, Cuba.

We are concerned that the lack of a comprehensive military detention system will continue to have numerous detrimental results, including: incentivizing lethal operations over law of war detention; the loss of critical detainee-provided intelligence; forcing the United States to be wholly dependent on foreign governments to hold and provide access to detainees; and, as in Warsame's case, bringing terrorists to the United States.

We recognize that there are significant reasons for not bringing detainees to Afghanistan from other areas of ongoing hostilities. However, this is the very reason another location for detention must be used. Such a location is already available at Guantanamo Bay. The facilities at Guantanamo, which are state-of-the-art and the result of millions of U.S. taxpayer dollars, make it unnecessary to bring terrorists to the United States.

As you know, apart from issues related to whether detainees can be prosecuted successfully in federal court, there are serious immigration-related issues that are triggered by bringing detainees to the United States. In *Zadvydas v. Davis*, the U.S. Supreme Court held that an individual can file for a writ of habeas corpus when the government has ordered their removal but cannot find a country to accept them. The Supreme Court further held that six months is presumed to be the maximum period permissible for confinement without charge. *Zadvydas* and other immigration-related laws could result in serious difficulties with removing terrorists who are either acquitted or who conclude their sentences. These difficulties are further escalated in cases like Warsame, where it could be extremely dangerous to remove detainees to unstable countries such as Somalia.

One need only look to our closest ally for examples of the possible consequences of bringing detainees to the United States. European courts have prevented the United Kingdom from deporting suspected terrorists whom their Government cannot otherwise prosecute. Lord Alex Carlile, the UK's Independent Reviewer of Terrorism Legislation, has said that such outcomes have resulted in the UK becoming a "safe haven" for terrorists.

While we agree that Warsame and other individuals like him are certainly eligible for detention pursuant to the 2001 Authorization for Use of Military Force, we also think that they are prosecutable under the Military Commissions Act of 2009. Although prosecution is not

necessary to detain terrorists under the laws of war, military commissions should be preferred over prosecution in federal court.

Our committees have a responsibility to ensure that the Administration's lack of a comprehensive detention system does not force it to take unnecessary legal and security risks in refusing to send foreign terrorists captured abroad to Guantanamo Bay or releasing those currently there. Accordingly, we request a briefing from the Administration related to the policies, procedures, guidance, criteria, or standards governing decisions regarding the detention, interrogation, or trial of terrorists captured outside Afghanistan and an explanation as to why detention at Guantanamo Bay is considered "off the table."

These are matters of grave importance. As charged by the Constitution and our constituents, we will continue to conduct rigorous and thorough oversight of these issues. We stand ready to work with you in addressing them, as they are fundamental to the protection of our national security.

Sincerely,

Howard P. "Buck" McKeon
Chairman
Committee on Armed Services

Lamar Smith
Chairman
Committee on the Judiciary

Mike Rogers
Chairman
Permanent Select Committee on Intelligence

Peter T. King
Chairman
Committee on Homeland Security

Ileana Ros-Lehtinen
Chairman
Committee on Foreign Affairs

COMMITTEE ON ARMED SERVICES

U.S. House of Representatives

Washington, DC 20515–6035

ONE HUNDRED TWELFTH CONGRESS

October 20, 2011

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. President:

I am writing regarding the National Defense Authorization Act (NDAA) for the Fiscal Year 2012. After receiving the Statement of Administration Policy regarding the FY12 NDAA, the House Committee on Armed Services also received a seven page document entitled "Detainee Provisions in National Defense Authorization Act" ("Detainee SAP") on June 9, 2011.

As you know, I have previously sent two letters requesting that we work collaboratively on detainee-related issues. In addition to these letters, my staff has repeatedly requested a meeting to discuss the Detainee SAP. To date, White House staff has not agreed to a meeting. Because of the refusal to discuss these issues, I will respond to matters raised in the Detainee SAP in this letter.

While I remain open to working together, I am very disappointed that the Administration has frequently shown a greater willingness to engage with international institutions, foreign governments, and the media on issues relating to our national security than it has the U.S. House of Representatives. This contrast is in every way antithetical to the responsibilities we owe the American people. Despite these serious concerns, the Armed Services Committee has a long tradition of collaborative, collegial, and open bipartisan dialogue. I have every intention of continuing this tradition.

As an initial matter, it is important to highlight the significant responsibilities with which Congress is charged relating to our national security. Article I Section 8 of the Constitution directs that Congress shall "provide for the common defense," "define and punish offenses against the Law of Nations," "declare war," "raise and support Armies," "provide and maintain a Navy," "make rules for the government and regulation of the land and naval forces," and "make rules concerning captures on land and water."

Over the past ten years, unilateral exercises of executive authority in the area of national security have too often resulted in a decrease in the executive's legal authorities as recognized by the judiciary. This is due in part to an increased willingness on the part of federal courts to make policy in the absence of greater input from Congress. The extent to which this has occurred is perhaps an unfortunate reality, but it is the one in which we live today. As Chairman of the Armed Services Committee, I simply refuse to leave it to the courts to make wartime policy when such decisions should instead be left to the political branches. It is the executive and legislative branches that are accountable to all American citizens.

I also feel it necessary for Congress to act when the Administration has elected to foreclose options that are critical to our national security. The Administration has shown a willingness to undertake nothing short of extraordinary action regarding targeting terrorists overseas. Yet, it has shown none of this resolve when it comes to detaining our enemies instead.

Before I address each section of the Detainee SAP, it is important to note that there are numerous critiques throughout it that address provisions or specific language that were never included as part of the House version of the FY12 NDAA. Thus, I will not address those specific critiques in my response.

Detainee Transfer Provisions

The Detainee SAP begins with the following statement: "Never before has the Congress sought to so limit and micromanage the military and other elements of our national security community in matters as basic as a detainee transfer..." Despite this assertion, the provisions in the FY12 NDAA relating to detainee transfer are nearly identical to provisions in the National Defense Authorization Act for the Fiscal Year 2011, when the House of Representatives was still under Democratic control, as well as in the Continuing Appropriations Act of 2011. Both of these bills were signed and enacted into law.

Director of National Intelligence James Clapper recently confirmed that the overall rate of reengagement for former Guantanamo detainees has risen to 27%. And this number does not take into account the fact that we simply do not know the status of many former detainees. Given that we are talking about individuals who are intent on killing Americans or our allies, these numbers are cause for serious concern. We have also learned over the past few years that several former detainees have become leaders in terrorists groups who pose a grave threat to the United States. These facts dictate great caution in formulating future policy.

As you may be aware, Ranking Member Adam Smith and I directed the Subcommittee on Oversight and Investigation to conduct a comprehensive and thorough study of transfer and release policies relating to Guantanamo Bay detainees. This study is still underway. I intend for this evaluation to assist all of us in ensuring that we have the soundest possible policy regarding the future transfer and release of Guantanamo detainees.

Although the House version of the FY12 NDAA contains significant restrictions for transferring and releasing Guantanamo detainees, the bill also contains an exception for detainees whose petitions for habeas corpus have been granted. While we believe that selecting an appropriate country to relocate these detainees must still be handled very carefully, there are no congressional restrictions on such efforts in the House version of the FY12 NDAA.

While I initially considered including language that would make the detainee transfer restrictions permanent, I discussed this issue with my minority colleagues as well as the Department of Defense and decided to limit the restrictions to this fiscal year so that we may consider the results of the Subcommittee's study before we contemplate permanent policy.

The Department of Defense has cooperated with the Subcommittee's study and my staff has also reached out to other executive branch agencies to ensure that the project is as well-informed as possible. I hope that you will direct those individuals and agencies that have relevant information to assist in this effort to ensure it is based upon the fullest spectrum of information.

The Detainee SAP credits the Administration with the fact that "the rate of release of detainees from Guantanamo to other countries during this Administration has slowed..." I agree that this is a positive step, which is due in significant part to Congress's efforts to ensure that we have the best policy in place to protect our soldiers overseas and our citizens here at home.

Restrictions on Transfers to the United States

Detention

In the Detainee SAP, the Administration argues that Congress is limiting disposition options for the handling of terrorism suspects. Yet, the SAP fails to address the primary reason for the transfer restrictions to the United States: the total failure of the Administration to create a comprehensive law of war detention system for future captures. The absence of such a policy means the Administration has itself taken off the table one of the most fundamental tools necessary during a time of war.

The Administration has essentially relinquished the use of detention outside of Afghanistan. While I recognize that there are significant reasons for not bringing detainees to Afghanistan from other areas of ongoing hostilities, this is the very reason another location for detention must be used. Such a location is already available at Guantanamo Bay. The facilities at Guantanamo are state-of-the-art, secure, and humane.

Despite these facts, senior Administration officials have repeatedly noted that they will not bring future captures to Guantanamo. For the extremely small number of terrorists who have

been detained, the Administration has relied on ad hoc procedures. And, in all cases, the Administration has been intent on bringing these individuals to the United States.

As I previously outlined in my letter regarding the Ahmed Warsame case, bringing terrorists to the United States has numerous consequences, including triggering immigration-related issues that could make it extremely challenging to remove terrorists who are either acquitted or who conclude their sentences. I also highlighted in my letter the challenges faced by the United Kingdom regarding this exact issue. Surely there must be a way to detain individuals who pose a threat to our national security without bringing them to the United States?

The lack of a comprehensive detention system will continue to have numerous detrimental results for our national security, including: releasing terrorists; incentivizing lethal operations over capture; the loss of critical detainee-provided intelligence; forcing the United States to be wholly dependent on foreign governments to hold and provide access to detainees; and, unnecessarily bringing terrorists to the United States.

Prosecution

In the Detainee SAP, the Administration discusses the need to preserve all options for prosecuting terrorists. However, the Administration has shown time and again that prosecution in federal court is its overwhelming preference. While Congress has not eliminated federal jurisdiction over any terrorism-related offenses, it has repeatedly shown that it instead prefers prosecuting terrorists in military commissions. Congress's role in selecting the appropriate court for certain categories of cases is not at all unique.

Article III Section 1 of the Constitution vests the judicial power of the United States "in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." Congress has routinely undertaken efforts to establish many specialty courts such as those for bankruptcy or claims against the federal government. The establishment and preference for use of military commissions is no different. While greater weight should be afforded the executive branch during a time of armed conflict, Congress's establishment of a military commission system by statute has been with the full support and cooperation of the current and former Administrations.

Following the Administration's initial cooperation with drafting and enactment of the Military Commissions Act of 2009, it has continuously delegitimized the system with its words and actions. Senior Administration officials constantly compare our federal courts to military commissions while vigorously defending the superiority of the federal courts. This comparison is premature, however, since the Administration has not given military commissions the opportunity to show their value. The courtrooms at GTMO have sat empty for two and a half years because the Administration has not allowed any cases to move forward.

It is also clear that the military commission system will not be successful unless it is fully supported and resourced with the best prosecutors, defense attorneys, and judges that the United States has to offer. This will require a mutual commitment on the part of the Departments of Defense and Justice. Once this has been done, perhaps a true comparison may be made.

Military commissions have been successfully used throughout U.S. history. Importantly, this has been done with the full support of both civilian and military leadership. When the U.S. Government prosecuted Nazi saboteurs before a military commission in 1942, the Attorney General himself acted as chief prosecutor alongside the Judge Advocate General of the U.S. Army. Secretary of War Henry Stimson noted in his diary that "instead of straining every nerve to retain civil jurisdiction of these saboteurs, [the Attorney General] was quite ready to turn them over to a military court." In 1945, former Attorney General and Associate Justice Robert Jackson took a leave of absence from the U.S. Supreme Court to act as chief prosecutor for the International Military Tribunal at Nuremberg.

This is the kind of commitment to justice that the victims of terrorist attacks, and all U.S. citizens, deserve from their government. And we owe at least that much to our men and women in uniform, who are risking much more every day. The efforts in the courtrooms at Guantanamo may be a different battle, but they are part of the same fight.

Affirmation of the 2001 Authorization for Use of Military Force

Lastly, I am greatly concerned by the section of the Detainee SAP addressing "Reaffirmation and Recharacterization" of the 2001 Authorization for Use of Military Force (AUMF). I am concerned that by opposing our efforts to affirm the authorities provided by the AUMF, the Administration could undermine and jeopardize its own current efforts.

As you know, the language in section 1034 of the House version of the FY12 NDAA is nearly identical to the Administration's interpretation of the authorities provided pursuant to the AUMF. In particular, the Administration announced its interpretation of the AUMF on March 13, 2009, in a filing in the U.S. District Court for the District of Columbia [attached for your reference]. The similarity of section 1034 to the March 13th filing is not merely a fortunate coincidence. I specifically included the same language to ensure that there would be no confusion as to the scope of authorities applicable to past and current operations.

While the March 13th filing and related legal filings pertain specifically to the executive's detention authority, my understanding is that the Administration uses the same interpretation when evaluating whom the military may lawfully target pursuant to the AUMF as well. This means that our men and women in uniform are currently relying on this interpretation everyday to prosecute the war.

While U.S. courts have largely accepted the Administration's interpretation of the AUMF, it is under constant attack in litigation relating to petitions for habeas corpus filed by Guantanamo detainees. Although these cases arise in the context of detention, the courts are conducting analyses of the scope of the AUMF. Thus, federal courts are making decisions that impact the military's targeting authorities as well. Because of the ongoing legal challenges, the Administration's interpretation may receive less favorable treatment over time if Congress does not affirm it.

There is also danger that as military operations wind down in Afghanistan, the courts could further tighten and narrow interpretation of the AUMF. Such tightening could severely undermine military operations outside of Afghanistan against al Qaeda and associated forces, particularly at a time when some of the most serious threats to the United States come from groups such as al Qaeda in the Arabian Peninsula. The Detainee SAP correctly notes that "the threat presented by al Qaeda will continue, and likely continue to evolve, and become more complex and diversified." Without explicit congressional acknowledgement of the executive's authority to undertake targeting and detention operations outside of Afghanistan, the authority to undertake these operations could be limited by the courts.

In *al-Bihani v. Obama*, the U.S. Court of Appeals for the D.C. Circuit noted that the court would evaluate the executive branch's detention authority in the context of "the sources courts always look to: the text of relevant statutes and controlling domestic caselaw." The court did not automatically accept the validity of the executive branch's interpretation of the AUMF. Instead, it devoted much of its analysis to scouring existing statutes in an attempt to gain some insight into Congress's view of the authorities it had provided.

Due to the lack of statutes specifically outlining the scope of the detention authority provided by the AUMF, the court turned to the only congressional statutes it could find that provided some guidance: the jurisdictional requirements for prosecution set forth in the Military Commissions Acts of 2006 and 2009. The court noted that the "provisions of the 2006 and 2009 MCAs are illuminating in this case because the government's detention authority logically covers a category of persons no narrower than is covered by its military commission authority. Detention authority in fact sweeps wider..." The court found these related statutes critical to its analysis and evaluation of the executive's asserted authority. Once again, the absence of statutory clarity forced the court to extrapolate detention authority from a framework for prosecuting war criminals.

In his much cited concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson described exercises of executive authority in relation to Congress. When acting in concert with Congress, he noted that the President "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."

As the report language accompanying the House bill makes clear, section 1034 is not intended to alter the Administration's existing authority pursuant to the AUMF in any way—it is intended only to reinforce it while at the same time asserting Congress's proper role. This is an area where both the executive and legislative branches should speak with one voice.

I would strongly caution the Administration against short-sighted attempts to reject congressional support. While the House was considering the FY12 NDAA, I received a letter from former chief judge of the U.S. District Court for the Southern District of New York and Attorney General Michael Mukasey who confessed, "I cannot for the life of me understand the opposition to this measure that is coming from people who profess to be concerned with civil liberties and the rule of law." I share Judge Mukasey's sentiments.

Congress must affirm that as our enemy has evolved, so too must the legal authorities needed to defeat them. Military operations are being conducted everyday pursuant to the AUMF and our men and women in uniform deserve to be on solid legal footing. Ten years after the horrific attacks of 9/11, we must not weaken our resolve. Nothing less is at stake than the lives of our fellow citizens and our safety at home.

I look forward to discussing these matters further at your earliest convenience.

Sincerely,

Howard P. "Buck" McKeon
Chairman

COMMITTEE ON ARMED SERVICES

U.S. House of Representatives

Washington, DC 20515–6035

ONE HUNDRED TWELFTH CONGRESS

January 24, 2012

President Barack Obama
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing regarding the case of Ali Mussa Daqduq, a senior Hezbollah operative suspected of involvement in the murder of several American service members. I previously sent a letter dated September 21, 2011 to the Secretary of Defense expressing my serious concerns regarding Daqduq's case.

The United States has sacrificed much blood and treasure in Iraq. I am extremely troubled, however, that in spite of this sacrifice and in spite of having Daqduq in U.S. custody, the Administration made the short-sighted decision to transfer Daqduq to Iraqi custody. The Iraqi Government's handling of this issue is also very troubling. The Government's unwillingness to cooperate with the United States by turning over a third country national alleged to have American blood on his hands is unacceptable.

My concerns regarding Daqduq's case are not limited to Iraq. As the Administration seeks to withdraw from Afghanistan, I urge you to be mindful of similar challenges, lest we repeat the same mistake in two theaters. The Administration must consider the issue of disposition of detainees in U.S. custody as it negotiates a long-term strategic security agreement with the Government of Afghanistan. Like Daqduq, many of these detainees represent an enduring security threat to the United States.

Furthermore, mission success should, as always, be the paramount consideration in concluding operations in Afghanistan. Therefore, the Administration must undertake greater efforts and precautions to ensure that similar outcomes will not occur as part of a hurried process to meet its desired deadlines for withdrawal.

Please find a continuation of this letter and further concerns related to Daqduq's case in a classified enclosure.

Sincerely,

Howard P. "Buck" McKeon

Howard P. "Buck" McKeon
Chairman

COMMITTEE ON ARMED SERVICES

U.S. House of Representatives

Washington, DC 20515–6035

ONE HUNDRED THIRTEENTH CONGRESS

February 25, 2013

The Honorable Barack Obama
President of the United States
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. President:

I am writing regarding the ultimate disposition of detainees currently in U.S. custody in Afghanistan. I previously sent two letters to Secretary Panetta outlining my concerns regarding this issue. In my most recent letter in September, I requested a complete suspense of detainee transfers to the Government of Afghanistan given conditions at the time.

My understanding of recent developments is that transfers of detainees to Afghan custody are continuing. I am extremely troubled by this development given Afghanistan's unwillingness to recognize the legality of law of war detention necessary during an armed conflict. I am particularly concerned about the disposition of detainees who continue to represent an enduring and serious threat both to our U.S. forces on the ground in Afghanistan as well as to U.S. national security.

For some of these detainees, there is also clear evidence that they are directly responsible for the deaths of Americans. We must not neglect justice as we exit Afghanistan. It is clear that if we do, these detainees will not likely remain in Afghan custody for long, if at all.

As you know, I joined with many other Members of Congress in expressing concern regarding the Administration's handling of Ali Mussa Daqduq, a senior Hezbollah leader responsible for the deaths of several U.S. soldiers in Iraq. The Administration turned Daqduq over to the Iraqis despite having little confidence that he would remain in custody. As expected, he was recently released.

Despite this tragic error, it seems we are poised to repeat history. I urge you to ensure that this is not the case. We must take responsibility for those detainees who pose a risk to our troops and to U.S. national security, and we must pursue justice in cases where we are able. I am

open to working with you to find an acceptable disposition for these detainees. There is only one option I consider completely unacceptable: failing to maintain custody of detainees who will continue to threaten our national security.

Sincerely,

Howard P. "Buck" McKeon
Chairman
Committee on Armed Services

HPM:cm